MORGAN STANLEY EMERGING MARKETS INC A

v.

METROPLEX BHD

HIGH COURT MALAYA, KUALA LUMPUR B
ANANTHAM KASINATHER J
[SUIT NO: D4-28-258-2005]
16 NOVEMBER 2010

COMPANY LAW: *Petition - Application to strike out - Whether petitioner a creditor for purposes of s. 217(1)(b) Companies Act 1965* C

CONTRACT: *Assignment - Validity - Whether assignment intended as an alternative to novation - Whether novation the only mode of transfer contemplated by parties* D

CONTRACT: *Novation - Effect of - Whether original contract extinguished and replaced with another - Whether consent of debtor required - Whether failed novation releases parties' obligations under original contract* E

This was the respondent's application to strike out the petitioner's petition on the ground that the petitioner was not a creditor for the purposes of s. 217(1)(b) of the Companies Act 1965. The facts showed that the petitioner was the assignee of rights F assigned by one banking organisation named Rothschild which had granted a loan to one Legend International Resort Ltd ('LIR') under a credit agreement in which the respondent had guaranteed the sums payable by LIR. Rothschild and the petitioner had earlier entered into a sale and purchase agreement G ('S & P') for the assignment of those rights whereby Rothschild had agreed irrevocably to sell by novation to the petitioner those of the assigned rights that were capable of novation, and otherwise sell, transfer, assign and convey the assigned rights to the petitioner. Rothschild had then sent a novation notice to the H petitioner dated 10 November 2004 as required under the credit agreement and the petitioner had signed the notice confirming its acquired rights effective 10 November 2004. Rothschild then notified LIR by letter on the same date of the assignment of the rights to the petitioner effective 10 November 2004. No notice I

had been given to the respondent. Subsequently, Rothschild and the petitioner executed a deed of assignment dated 7 April 2005 which referred to the S & P and confirmed the assignment of rights from Rothschild to the petitioner. Notices dated 7 April 2005 were then sent to LIR and the respondent notifying them of the deed of assignment. The credit agreement, S & P, novation notice, deed of assignment and notices were all stated to be governed by Singapore laws.

The issues were: (1) whether Rothschild and the petitioner could have sought, at one and the same time, to novate the AR and to the extent the AR could not be novated, to have assigned them; (2) whether LIR and the respondent were released from their obligations as borrower and guarantor respectively from their obligations under the credit agreement when the novation failed; (3) whether the AR were effectively assigned under the S & P or alternatively by way of the deed of assignment; and (4) whether Rothschild failed to assign the benefit of the guarantee.

Held (dismissing the respondent's striking out application):

(1) Contractual terms must be construed in the light of the context in which they were drafted. Narrow and technical constructions which are inconsistent with the whole scheme of a given contract must be rejected and the circumstances in which the contract was concluded must be eschewed (*Strait Advisers Private Limited v. Behrimger Holdings [Pte] Ltd, Zurich Insurance Singapore [Pte Ltd] v. B-Gold Interior Design & Construction Pte Ltd*). (para 15)

(2) Upon construing cl. 2 of the S & P, there was no doubt that it catered for both modes of disposal as alternatives. Although, the primary purpose of the S & P was to novate the AR to the petitioner, the language used in cl. 2(a) read in its proper context and against the background facts sufficiently manifested an intention on the part of the parties to transfer the AR to the petitioner by way of an assignment, if novation should fail. The construction of cl. 2 in that manner served the commercial purpose of the transaction since clearly the intention of Rothchild was to transfer the AR to the petitioner one way or another. Novation having failed due to the failure of Rothchild

to consult LIR in advance as required under the credit agreement, it followed that the assignment was the alternative mode contemplated by the parties to give effect to the transfer. Further, the phrase "and otherwise" followed by the words "sells, transfers, assigns" in cl. 2 reflected an intention on the part of Rothchild and the petitioner to transfer the AR to the petitioner, if not by the first preferred method of novation, then by any other means including but not limited to assignment. (paras 16 & 17)

(3) The court was not concerned with the quality of the drafting of cl. 2 of the S & P but to ascertain the real intention of the parties from a reading of cl. 2 as a whole. (para 18)

(4) The notice of assignment of 10 November 2004 which followed very shortly after the S & P and the issuance of the novation notice expressly mentioned the loan as having been assigned by Rothchild to the petitioner with effect from 10 November 2004. Since the novation notice took effect from 10 November 2004, the only reasonable inference that Rothchild gave notice of the assignment was to provide for the contingency in the event the novation failed. The use of the words "has assigned all our rights" in the past tense could only refer to cl. 2 since that was the only instrument of assignment in existence at the material time. (para 19)

(5) An assignment is a transaction between the creditor and the assignee to which the consent of the debtor is not needed. Notice is given to the debtor to either complete a statutory assignment or to preserve priorities in the case of an equitable assignment. In that context, a debtor like the defendant in the present case could not claim that the intention of the assignor and the assignee was not to create an assignment when the debtor admitted to the existence of the assignment through their contemporaneous exchange of documents. Since Rothchild and the petitioner treated cl. 2 of the S & P as giving rise to an assignment, it was not open to the debtor like LIR or the guarantor like the respondent to contend otherwise. (para 19)

(6) In the English court case of *The Agro Fund Ltd v. Essar Steel Ltd*, the validity of novation and assignment being two alternatives and mutually exclusive modes of transferring a debt was acknowledged. In the absence of judicial pronouncements to the

contrary by any of the superior courts of Singapore on the same issue and following the said case on the grounds of persuasive authority, it was therefore not legally incompatible for Rothchild and the petitioner to have sought at one and the same time to novate the AR and to the extent the assigned AR could not be novated to effect the assignment of those rights. (para 20)

(7) The effect of novation extinguishes the original contract and replaces it with another. The novation in favour of the petitioner in the present case never materialised. As such, the failed novation did not release LIR as borrower or the respondent as guarantor of their obligations under the credit agreement. (para 21)

(8) It was clear that the definition of AR included Rothchild's right to enforce the guarantee as security for payment of the sums owed by LIR. There was a valid and effective assignment of those rights to the petitioner under the S & P. The S & P provided for Rothchild to, *inter alia*, assign the AR to the petitioner. Notice of the assignment was given to LIR and the respondent at the latest on or about 7 April 2005. Those facts justified the conclusion that an effective legal or statutory assignment came into effect at the latest on 7 April 2005. Also, the assignment fulfilled all the pre-requisites for a valid legal assignment. (paras 25 & 26)

(9) Since the S & P was the instrument of assignment, the benefit of the guarantee not being assigned was a non-issue. Further, the petitioner's rights to enforce the guarantee were secured effective 7 April 2005 upon the execution of the further assignment and the service of the notice on the respondent. That assignment was valid, even if, Rothchild failed to assign the benefit of the guarantee at or around or shortly after 10 November 2004. (para 28)

Case(s) referred to:

Lanxess Private Limited v. APP Chemical International (MAN) Limited [2009] 2 SLR (R) 769 ***(refd)***

Straits Advisers Private Limited v. Behrimger Holdings [Pte] Limited [2009] SGGA 55 ***(refd)***

Goodridge v. Macquarie Bank Ltd (ABN 46 008 583 542) ***(refd)***

Legislation referred to:
Companies Act 1965, s. 217(1)(c)
Rules of the High Court 1980, O. 18 r. 19

Civil Law Act [Sing], s. 4(8)

For the petitioner - Rabindra Nathan (M Sujintana with him); M/s Shearn Delamore & Co
For the respondent - Wong Rhen Yen (K Balaguru & Victor Teoh with him); M/s Dennis Nik & Wong
For the supporting creditor/Hong Leong Bank and Malayan Banking Bhd - Conrad Lopez
For the supporting creditor/HSBC - Elaine Chong
For the creditor/OCBC - GC Tan

Reported by Usha Thiagarajah

JUDGMENT

Anantham Kasinather J:

Background Of Facts

[1] On 14 June 1996, Legend International Resort Ltd ('LIR'), Metroplex Berhad ('Metroplex') and Rothschild entered into a Credit Agreement whereby Rothschild and other banks (collectively referred to as the Lenders) agreed to extend various banking facilities to LIR on the terms and conditions set out in the Credit Agreement, one of which was for Metroplex (the respondent) to guarantee the sums payable by LIR.

[2] Rothschild and Morgan Stanley entered into the Sale and Purchase Agreement dated 8 November 2004 ('S&P') Rothschild agreed irrevocably to sell 'by novation' to Morgan Stanley 'those of the Assigned Rights that are capable of novation, and otherwise sells, transfers, assigns, and conveys the Assigned Rights' to Morgan Stanley.

The subject matter of the S&P, the 'Assigned Rights' ('AR') was defined to mean:

> any and all of (Rothschild's) right, title, and interest in, to and under the Loan and to the extent related thereto, the following:
>
> a) All other amounts funded by or payable to (Rothschild) under the Credit documents and all obligations owed to (Rothschild) in connection with the Loans;

A b) The Credit Documents;

c) …

d) All claims … and any other right of (Rothschild), whether known or unknown, against (LIR), any Obligor, ... or other
B Entity that in any way is based upon, arises out of or is related to any of the foregoing including … any other right of (Rothschild) against … other Entity arising under or in connection with the Credit documents;

e) All Guarantees and all Collateral and security of any kind for
C or in respect of the foregoing;

f) …

g) …

D h) …

Rothschild executed and delivered a Novation Notice dated 10 November 2004 in accordance with cl. 24(C) and Schedule 2 of the Credit Agreement listing as "rights and/or Obligations to be
E Novated":

a) Existing Lender's Commitment to be novated: US$4,900,000 and

b) Existing Lender's Outstandings to be novated: US$4,900,000.

F

[3] Morgan Stanley signed the Novation Notice agreeing that it "assumes and acquired new rights and/or obligations in accordance with cl. 24(C)" of the Credit Agreement on and with effect from 10 November 2004. The Novation Notice was signed by Morgan
G Stanley as New Lender and by Rothschild both in its capacity as Existing Lender and as Agent on behalf of *(inter alia)* "the other parties to the Agreement".

[4] Rothschild notified LIR, by letter dated 10 November 2004, that it had "assigned all (its) rights, title and interest in the above
H loan with effect from 10 November 2004 to (Morgan Stanley)". No notice appears to have been given to Metroplex.

[5] Subsequently, Rothschild and Morgan Stanley executed a Deed of Assignment dated 7 April 2005 which referred to the S&P
I Agreement and stated that Morgan Stanley wishes, for the avoidance of doubt "to ensure … that it has so acquired by way of assignment

from Rothschild, all of Rothschild's right, title and interest in, to and under the Assigned Rights (as such term is defined in the Sale Agreement) and as contemplated by the Sale Agreement". The recitals also provided that it was "in order to ensure that this is so" that Rothschild and Morgan Staley were entering into the Deed of Assignment (the "Further Assignment").

[6] A notice to LIR and Metroplex dated 7 April 2005 was sent notifying them that:

> Pursuant to a deed of assignment dated 7th April 2005 between the Assignor and Assignee, to the extent that the Assignor still retained any of the same as at the date of Assignment, the Assignor assigned to the Assignee:
>
> a) All of such right, title and interest of the Assignor in, to and under the Outstandings which the Assignor may or may have had and
>
> b) All of such right, title and interest of the Assignor in, to and under the Assigned Rights which the Assignor may or may have had.

[7] A further notice to LIR and Metroplex dated 7 April 2005, was sent notifying them that, pursuant to the S&P, Rothschild had "assigned to (Morgan Stanly) on 10 November 2004 all of the Assigned Rights".

[8] The Credit Agreement, S&P, Novation Notice, Deed of Assignment and notices dated 7 April 2005 were all stated to be governed by and construed in accordance with, the laws of Singapore.

[9] On 13 April 2005, Morgan Stanley filed a winding up petition against the respondent and on 15 April 2005 applied for the appointment of a provisional liquidator.

History Of Case In Our Courts

[10] Based on above facts, the plaintiff filed the petition to wind-up the respondent as the guarantor under the Credit Agreement, on 11 April 2005. The respondent responded by filing an application on 13 May 2005, under O. 18 r. 19 of RHC to strike out the petition. In the supporting affidavit, the respondent contended before a different judge of this court, that the petitioner is not a creditor for the purposes of s. 217(1)(c) of the Companies Act 1965. The judge

hearing the application, agreed to determine this issue on the basis of answers to questions to be framed by counsel for both parties by way of agreed issues. The agreed issues framed by counsel are:

a) First Issue: Was it legally incompatible for Rothschild and the Petitioner to have sought at one and the same time, to novate the Assigned Rights, and to the extent the Assigned Rights could not be novated to have assigned those Assigned Rights:

b) Second Issue: Whether, on the true construction of the Credit Agreement and the Novation Notice, if the attempted novation to the petitioner by Rothschild failed, were LIR as borrower and the respondent (Metroplex) as guarantor released from their obligations under the Credit Agreement?

c) Third Issue: if the failed novation did not release or otherwise discharge the rights as between Rothschild and each of LIR and the respondent (Metroplex), were those rights effectively assigned to the petitioner (Morgan Stanley) by way of the assignment under the Sale & Purchase Agreement or alternatively, by way of the Further Assignment on 7 April 2005:

d) Fourth Issue: Whether, having regard to the construction of relevant contemporaneous documents under which the assignment of the Assigned Rights was effected, Rothschild had failed to assign the benefit of the guarantee at or around or shortly after 10 November 2005 and if not, what is the effect under Singapore law?

[11] Since the proper law under the relevant agreements is Singapore Law, the Judge having conduct of this matter before the same reached this court, ordered the agreed issues to be the subject matter of a written opinion by a court appointed expert witness on Singapore Law. Each party, in turn, was permitted by the judge to submit an expert report commenting on the report of the court appointed expert. The identity of the court appointed expert was to be determined by the court, based on nominations provided by both sets of counsel. Based on appointments made by the earlier judge and the opinions of experts appointed by the parties themselves, there are before the court presently the opinions of Mr. Kenneth Tan SC, Mr. Narayan Vijya Kumar, Mr. Davinder Singh SC and Mr. Quentin Loh SC (QL) (as he then was). QL was the court appointed expert. Due to QL being elevated to the bench in

Singapore, I was required to appoint a new expert based on nominations placed before me. On 11 March 2010, I selected Mr. Alvin Yeo Khirn Hai ('Mr. Yeo') to provide, yet, another expert report on the agreed issues based on Singapore Law. However, as Mr. Yeo's opinion is designed to assist the court in coming to a decision, counsel required me to consider all of the earlier opinions rendered on the same issues. Accordingly, I have the unenviable task of deciding which of the several expert opinions, in my opinion, represents the Singapore law on the agreed issues.

First Issue

Was It Legally Incompatible For Rothschild And The Petitioner To Have Sought At One And The Same Time, To Novate The Assigned Rights, And To The Extent The Assigned Rights Could Not Be Novated To Have Assigned Those Assigned Rights

[12] A summary of the opinion of Mr. Yeo on the first issue is as follows:

1. Rothschild's entitlement to simultaneously novate rights and to the extent the rights are not novated, assign them in order to dispose of those rights to Morgan Stanley is to be found in cl. 2 of the S&P. This clause, which reads as follows:

> In consideration of the mutual covenants and agreements in, and subject to the terms and conditions of, this Agreement:
>
> a) Subject to the satisfaction of the conditions in Section 3.2 *[Rothschild] agrees irrevocably to sell to [Morgan Stanley] by novation those of the Assigned Rights that are capable of novation, and otherwise* sells, transfers, *assigns,* and conveys *the Assigned Rights to [Morgan Stanley]* with effect from and including the Closing Date;
>
> b) Subject to the satisfaction of the conditions in Section 3.1, [Morgan Stanly] acquires the Assigned Rights, and agrees to perform and comply with Assumed Obligations, with effect on and after the Closing Date, and
>
> c) Notwithstanding the foregoing, (i) [Rothschild) agrees to remain responsible for, and assumes and agrees to perform and comply with the Retained Obligations, and (ii) [Morgan Stanley] assumes no obligations other than the Assumed Obligations.

This Agreement is intended to, and upon execution hereof and satisfaction or waiver of the conditions precedent set forth in s. 3 shall, **effect a true sale of the Assigned Rights** and the Assumed Obligations" provides the mechanism for Rothschild to undertake this exercise.

2. Whether it is legally compatible or otherwise under cl. 2 for Rothschild to undertake this exercise, in turn, depends on (i) whether it would be inconsistent with the terms of the Credit Agreement (which is the source of the rights in question and sets outs the parameters for their disposal) and (ii) whether apart from that, there would be some other ground which would make it contradictory for an assignment to operate upon a failed (or inoperative) novation attempt.

3. The scope of cl. 2 has to be construed, having regard to the very basis of contract law that parties are free to enter into such contract as they may wish and upon such terms as they may feel necessary and advantageous to them subject to statutory intervention. According to Mr Alvin Yeo, if the cl. 2 mechanism is within the scope of the parties' intention (as set out in the Credit Agreement), it should not – without more – be legally incompatible.

4. The Credit Agreement provided for the disposal by the lenders of their rights under the Contract in cl. 24(C) of the Credit Agreement. This clause provided as follows:

24. Assignment and Novation

(a) *Benefit and Burden of Agreement: This Agreement shall benefit and be binding on the parties,* the New Company (as defined below) following an effective assignment and transfer in accordance with sub-Clause (B), any New Lender in respect of which a Novation Notice becomes effective in accordance with sub-Clause (C), *their permitted assignees and their respective successors* …

(b) …

(c) Lenders: any Lender may at any time novate all or part of its Outstandings and/or novate all or part of its Commitment to any bank or financial institution after consultation with the Obligors but without their consent …

Any Lender may at any time assign all or part of its Outstandings to any person without the consent of any party.

The costs, if any, incurred by any Lender, its transferee or assignee, in connection with a novation or assignment pursuant to this sub-clause not be borne by the Borrower.

(d) …

(e) Disclosure of Information: The agent or any of the Lender may disclose to an actual or potential New Lender, assignee, sub-participant or the like such information about either Obligor or any other person as it may think fit. (emphasis added)

5. It is evident from a literal reading of cl. 24(C) that Rothschild or, for that matter, any lender, could at any time dispose of its rights under the Credit Agreement through a novation or an assignment.

6. According to Mr Alvin Yeo, it is within the ambit of cl. 24(C) of the Credit Agreement for Rothschild to transfer the "Assigned Rights" to Morgan Stanley by either novation or assignment. The mechanism in cl. 2 of the S&P provides for both to cover the contingency that one proves unsuccessful or ineffective.

There Can Be A Valid Assignment Of Rights Which Formed The Subject Matter Of A Failed Novation

[13] Under this caption, Mr Alvin Yeo sets out the Singapore Law to be as follows:

(i) In principle, novation and assignment are mutually exclusive and distinct modes by which Rothschild can convey the 'Assigned Rights' to Morgan Stanley;

(ii) An Assignment of the debt owed by LIR to Rothschild operates as an effective transfer without the consent or collaboration of LIR. However, novation requires LIR's consent as a new contract is created between LIR and Morgan Stanley and this will substitute the Credit Agreement between LIR and Rothschild;

(iii) The effect of a novation is not to assign or transfer rights but to extinguish the original contract and replace it with another. A failed or inoperative novation will therefore not alter the rights between the parties as the original contract continues as it had before;

(iv) Accordingly, it should not be contradictory in any way for Rothschild to seek a novation of the 'Assigned Rights' and to the extent such a novation is unsuccessful, assign the 'Assigned Rights' to Morgan Stanley; for the assignment would take place in relation to the original contact, as regards any rights that had not been novated.

Submission Of Counsel For The Respondent

[14] Counsel for the respondent submitted that whilst it is not incompatible to seek a novation of the 'Assigned Rights' and to the extent such a novation is unsuccessful, assign the 'Assigned Rights' to Morgan Stanley, this is not what the parties intended in cl. 2 of the S&P. Relying on the report of QL, counsel submitted that on a plain reading of cl. 2, it is clear that the S&P was intended to novate, ie sell and transfer all the rights and obligations of Rothschild under the Credit Agreement to the petitioner. The thrust of his submission, based on QL's first report of 19 September 2006, was that there is no clause or language in the S&P catering for the alternative assignment of rights, or obligation, in the event, novation is for some reason or other ineffective.

Decision Of Court On The First Issue

[15] In my judgment, the approach to be adopted in the construction of the contractual terms including cl. 2 is that adopted by the Singapore Court of Appeal in the case of *Straits Advisers Private Limited v. Behrimger Holdings [Pte] Limited* 2009 SGGA 55. Justice Andrew Phang, delivering the judgment of the court in that case, following the earlier decision of *Zurich Insurance Singapore [Pte Ltd] v. B-Gold Interior Design & Construction Ptd Ltd*, pronounced that contractual terms must be construed in the light of the context in which they were drafted. The court rejected narrow and technical constructions which are inconsistent with the whole scheme of a given contact and held that the circumstances in which it was concluded must be eschewed. Justice V.K Rajah, in an earlier judgment of the Court of Appeal, in the case of *Zurich Insurance* adopted the following cannons of construction in the construction of contractual clauses.

a) The **whole contract approach** – excessive focus should not be given to a particular word or phrase (in that case, the word 'seeks'). Rather, the emphasis should be on the document as a whole. The construction of a document as a whole necessarily involves giving effect to each part of it in relation to all other parts of it.

b) The **business purpose** – Due consideration should be given to the commercial purpose of the transaction or provision. The courts have regard to the overall purpose of the parties with respect to a particular transaction, or more narrowly the reason why a particular obligation was undertaken.

c) Avoid unreasonable results – any construction that leads to 'very unreasonable' results should be avoided, unless it is required by clear words in the contract and there is no other tenable construction. It follows that the more unreasonable the result is, the clearer the intention of the parties has to be (ie, that it is the unreasonable result that was intended)

[16] In my judgment, construing cl. 2 of the S&P, in the context of cl. 24(C) of the Credit Agreement, there can be, no doubt, that the intention for the inclusion of cl. 2 in its present form was to cater for both modes of disposal as alternatives. I agree with QL that the primary purpose of the S&P was to novate the 'Assigned Rights' to Morgan Stanley. However, in my opinion, the language used in cl. 2(a), read in its proper context and against the background facts sufficiently manifest an intention on the part of the parties to transfer the 'Assigned Rights' to Morgan Stanley by way of an assignment, if novation should fail. In my opinion, the construction of cl. 2 in this manner serves the commercial purpose of the transaction since clearly the intention of Rothschild was to transfer the 'Assigned Rights' to Morgan Stanley by one way or another. Novation having failed due to the failure of Rothschild to consult LIR, in advance, as required under the Credit Agreement, assignment is the alternative mode contemplated by the parties to effect the transfer.

[17] In my opinion, the phrase 'and otherwise' followed by the words "sells, transfers, assigns," in cl. 2 of the S&P reflects an intention on the part of Rothschild and the petitioner to transfer the 'Assigned Rights' ('AR') to the petitioner, if not by the first preferred method of novation, then, by any other means including but not limited to assignment. I understand QL's opinion to be that a distinction ought to be drawn between the meaning of the words

A "incapable" and "ineffective". QL seems to imply that to the extent novation was possible but for the failure of Rothschild to consult LIR, the AR were capable of being assigned. In other words, the AR did not become incapable of being assigned even if LIR was not consulted. The AR, in those circumstances, only ceased to be
B effective. For this reason, and the presence of the word 'conveys' in cl. 2, QL opined that the use of the word 'incapable' meant that the intention was only to novate and the alternative option of assignment was not intended by the parties. QL sought to fortify his opinion by stating that if assignment was intended as an
C alternative, then, it would not have been difficult for the draftsmen to have drafted the clause to the following effect; 'In the event that this novation shall for any reason whatsoever be ineffective then this agreement shall take effect as an assignment of rights'.

D **[18]** With respect, I beg to defer. In my opinion, QL in his opinion places emphasis on the word 'incapable', to the exclusion of most other words in cl. 2. For instance, QL has failed to give due consideration to the words 'and otherwise' and the word 'assigned' that followed 'and otherwise'. Admittedly, a better choice of words
E in cl. 2, if assignment was intended as an alternative, would have been to use the word 'ineffective'. However, the court is not concerned with the quality of the drafting but to ascertain the real intention of the parties from a reading of cl. 2, as a whole. As regards the likelihood of the draftsmen having drafted cl. 2 in the
F manner suggested by QL if assignment was intended, it can be equally contended on behalf of the draftsmen that he would have excluded the words 'and otherwise sells, transfers, assigns' if all that was intended was a novation. Clause 2, in my opinion, if novation was the only mode of transfer contemplated by the parties would
G arguably have been drafted to read as follows; "subject to the satisfaction of the conditions in section 3.2, Seller agrees irrevocably to sell to buyer by novation those of the AR that are capable of novation and conveys the AR to buyer with effect from and including the Closing Date".

H **[19]** There are two other reasons for my conclusion that the parties by cl. 2 of the S&P, intended to create the two alternative modes of novation and assignment to transfer the AR. First, the Notice of Assignment of 10 November 2004 which followed very
I shortly after the S&P and the issuance of the Novation Notice expressly mentioned the loan as having been assigned by Rothschild to the petitioner with effect from 10 November 2004. Since the Novation Notice took effect from 10 November 2004, the only

reasonable inference is that Rothschild gave notice of the Assignment to provide for the contingency of the Novation created by cl. 2 of the S&P and rendered effective on 10 November 2004 by the Novation Notice being ineffective in law. The use of the words 'has assigned all our rights' in the past tense can only refer to cl. 2 of the S&P since that was the only instrument of assignment in existence at that point of time. Secondly, I agree with the opinion of Mr. Yeo that an assignment is a transaction between the creditor and the assignee to which the consent of the debtor is not needed. Notice is given to the debtor either to complete (or 'perfect') a statutory assignment or in the case of an equitable assignment to preserve priorities. Viewed in this context, in my opinion, a debtor like the defendant cannot claim that the intention of the assignor and the assignee was not to create an assignment when they themselves freely admit to the existence of the assignment through their contemporaneous exchange of documents. Likewise, in this case, since Rothschild and the petitioner treated cl. 2 as giving rise to an assignment, it is not open to the debtor like LIR or the guarantor like the respondent to contend otherwise.

[20] I understand that the issue of whether there can be a valid assignment of rights, in the face of a failed novation is not the subject matter of a decision by any Superior Court in Singapore. For this reason, Mr Yeo referred the Court to the case of *The Argo Fund Ltd v. Essar Steel Ltd.* In this case, the English Court of Appeal considered an agreement which provided for both novation and assignment, and the court acknowledged the validity of novation and assignment being two alternative and mutually exclusive modes of transferring a debt. The court held that such an intention was consistent with English Law. It is common ground that judgments from England are of persuasive value in Singapore, in the absence of judicial pronouncements to the contrary, by any of the superior courts of Singapore on the same issue. Accordingly, I hold that as a matter of Singapore Law, I do not consider it to be legally incompatible for Rothschild and Morgan Stanley to have sought at one and the same time to novate the AR, and to the extent the Assigned AR could not be novated, to effect the assignment of those rights.

A

Second Issue

Whether, On The True Construction Of The Credit Agreement And The Novation Notice, If The Attempted Novation To The Petitioner By Rothschild Failed, Were LIR As Borrower And The Respondent
B *(Metroplex) As Guarantor Released From Their Obligations Under The Credit Agreement?*

[21] I do not propose to deal with this issue at length, since counsel for the respondent has conceded in his written submission that he accepts that the failed novation did not release either LIR
C as borrower or Metroplex as Guarantor of their obligations under the Credit Agreement. This concession, in my opinion, is rightly made since it is trite law that the effect of an novation is to extinguish the original contract and replace it with another. As acknowledged by Mr Yeo, cl. 24(C) contemplates LIR assuming new
D obligations to Morgan Stanley before there can be any question of LIR being discharged of its obligation to Rothschild. On the facts of this case, to the extent that the novation in favour of Morgan Stanley never materialised, the question of either LIR or Metroplex being released of their obligations under the original contract does
E not arise. Accordingly, I answer the second issue by holding that on the true construction of the Credit Agreement and the Novation Notice, the inoperative novation did not result, *per se*, in LIR and Metroplex being released from their obligations under the Credit Agreement. The defendant's own expert acknowledged this to be the
F case (see para. 9 of the report of Mr. Kenneth Tan).

Third Issue

If The Failed Novation Did Not Release Or Otherwise Discharge The Rights As Between Rothschild And Each Of Lir And The Respondent
G *(Metroplex), Were Those Rights Effectively Assigned To The Petitioner (Morgan Stanley) By Way Of The Assignment Under The Sale & Purchase Agreement Or Alternatively, By Way Of The Further Assignment On 7 April 2005*

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[22] Mr Yeo seeks to deal with this issue by first setting out the rights of Rothschild under the Credit Agreement. These rights, according to him are:

I

1) a) The right to repayment of the loan by LIR and

   b) The right to enforce the guarantee and indemnity against Metroplex to obtain payment of the sums owed by LIR.

2) The rights under the S&P include the 'Assigned Rights'. Clause 1.1 of the S&P defines AR to mean "any and all of (Rothschild's) right, title, and interest in, to and under the Loans and to the extent related thereto, the following:

   a) All other amounts ... payable to (Rothschild) under the Credit Documents and all obligation owed to (Rothschild) in connection with the Loans;

   b) The Credit Document;

   c) ...

   d) All claims...and any other right of (Rothschild) ... against (LIR). (Metroplex), ... or any other Entity that in any way is based upon, arises out of or is related to any of the foregoing ... and any other right of (Rothschild) against ... any other Entity arising under or in connection with the Credit Documents;

   e) All guarantees and Collateral and security of any kind for or in respect of the foregoing...

   f) ...

   g) ...

   h) ..."

3) The Definition of AR therefore encompassed the rights as between Rothschild and LIR (to recover the loan) and Rothschild and Metroplex (to enforce the guarantee as security for payment of the sums owed by LIR)

4) The next issue, according to Mr Yeo, is whether the assignment of these rights to Morgan Stanley under the S&P was effective.

5) Mr Yeo then dealt with the Singapore Law on the subject of an assignment.

   a) An Assignment can take effect in law (statutory) or in equity.

b) Under Singapore law, legal (or statutory) assignments are governed by s. 4(8) of the Civil Law Act which states:

> Any absolute assignment by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed before 23 July 1909, to pass and transfer the legal right to such debt or chose in action, from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

c) It is trite law that an assignment which does not comply with the statutory requirement may still operate as an equitable assignment.

d) The Singapore Court of Appeal, in *Tsu Soo Sin v. Oei Tjong Bin* noted that there are three requirements for an effective equitable assignment:

i) An intention to assign;

ii) Clear identification of the chose being assigned; and

iii) Some act by the assignor showing that he is passing the chose in action to the assignee.

e) Notice to the debtor, while desirable, is not essential. Hence lack of notice does not render the equitable assignment ineffective:

> ... As for equitable assignments, there is no requirement of notice to the debtor or even the assignee; what must be shown is a manifestation of the assignor's intention to assign (see *Tsu Soo Sin v. Oei Tjong Bin* [2009] 1 SLR (R) 529)

f) An equitable assignment is not in any substantive terms less "effective" than a legal (statutory) assignment as the distinction between the two forms is largely procedural. As explained in Chitty on Contracts:

> The general effect of the section is to allow the assignee to sue the debtor in his own name instead of, as previously, having to sue in the name of the assignor and perhaps having to go to a court of equity to compel his joinder in the action. The section:
>
> ... is 'merely machinery' ... it enables an action to be brought by the assignee in his own name in cases where he could so sue. (emphasis added)

g) In a similar vein, he said the Federal Court of Australia, in *Goodridge v. Macquarie Bank Ltd* (ABN 46 008 583 542) and Another, when analyzing a provision akin to s. 4(8) of the Singapore Civil Law Act, held as follows;

> ... s. 12 operates to pass and transfer the legal title to a debt or legal chose in action to the assignee by the debtor or obligor being given actual notice of the assignment. The section contemplates that the assignment can be effective in equity before notice is given. The assignments here were transactions for value between assignors and assignees intended to dispose then and there of whatever rights the former had to any debt or legal chose in action against Mr Goodridge. And, if effective, the assignees would be entitled to enforce, and to use the assignors' names to enforce, the rights assigned as soon as the transactions between them occurred, whether or not Mr Goodridge knew anything about them. What s. 12 does is to give a further means of enforcement to assignees of debts or legal chose in action; it does not deal with the transaction of the assignment itself. This is because s. 12 operates on a pre-existing equitable assignment and recognizes that the mere giving of notice of the assignment to the debtor or obligor does not overcome equities that would have bound the conscience of the assignee in the enforcement of its rights. (emphasis added)

h) In short, according to Mr Yeo, notice (or the lack thereof) does not affect the validity of the assignment but can go to whether the assignment is an equitable or legal (statutory) assignment. For an effective assignment, the touchstone is a manifestation of the assignor's intention to assign. Mr Yeo then proceeded to quote the following passage from Andrew Phang Boon Leong, Cheshire, Fifoot and Furmston's Law of Contracts, Second Singapore and Malaysian Edition (Butterworths Asia 1998) which was cited with approval by the Singapore Court of Appeal in *Tsu Soo Sin v. Oei Tjong Bin*;

> An absolute assignment of an existing chose in action, whether legal or equitable, is complete as soon as the assignor has finally and unequivocally indicated that it is henceforth to belong to the assignee. Nothing more is necessary.

i) Applying the Singapore law to the facts of the instant case, Mr Yeo, opined that:

> Here, the Sale and Purchase Agreement provided for Rothschild to, *inter alia*, assign the AR to Morgan Stanley. Notice of the assignment was given to LIR and Metroplex at the latest on or about 7 April 2005. I am of the view that this was an effective legal (or statutory) assignment.

j) (i) The first requirement for a legal/statutory assignment is that the assignment is 'absolute' which means there are no conditions attached and the assignor is seeking to pass his entire interest in the subject matter of the chose in action to the assignee. The operative clause in the instrument of assignment is cl. 2 of the S&P which states that Rothschild agrees "irrevocably" to "sell[s], transfer[s], assign[s] and convey[s] the Assigned Rights" to Morgan Stanley. The fact of the assignment being irrevocable and the breadth of the definition of AR makes it clear that this is an absolute assignment of Rothschild's entire interest under the Credit Agreement.

(ii) The second requirement (that the assignment be in writing under Rothschild's hand) is apparent from the fact of the S&P.

(iii) The third requirement is that of notice. There is no prescribed form of notice but the notice must be clear and unambiguous. The notice must also expressly or implicitly record the fact of assignment and must plainly indicate to the debtor that by virtue of the assignment, the assignee is entitled to receive the money.

> The requirement of notice does not oblige the assignor or assignee to follow a prescribed form or even make express, direct reference to the assignment. All that the assignor or assignee must do under Section 4(8) of the Act is to convey, in writing, information relative to the

> assignment that indicates to the debtor that by virtue of the assignment, the assignee has the right to the benefit of the obligation in question.
>
> (see *Lanxess Private Limited v. APP Chemical International (MAN) Limited* [2009] 2 SLR (R) 769.

k) The notice to the borrower (LIR) of the assignment was sent on 10 November 2004 and stated as follows:

> Re: LOAN FACILITES (outstanding principal US$4,900,000) US$17,000,000 Credit Agreement dated 14 June 1996.
>
> This is to inform you that NM Rothschild & Sons (Singapore) Limited has assigned all our rights, titles and interest in the above loan, with effect from 10 November 2004, to Morgan Stanley Emerging Markets Inc. (emphasis added)

l) The notice clearly indicated to LIR that by virtue of the assignment, Morgan Stanley has the right to the benefits previously held by Rothschild under the Credit Agreement (which includes the guarantee and indemnity). Although this notice dated 10 November 2004 was not sent to the guarantor (Metroplex), it is plausible that Metroplex had notice of it being the majority shareholder of LIR. In any event, written notice of this assignment was sent to Metroplex five months later, on 7 April 2005.

m) The notice dated 7 April 2005 was addressed to both LIR and Metroplex, referred to the Credit Agreement in the subject heading and provided as follows:

> We hereby notify you that pursuant to a purchase and sale agreement dated 8th November 2004 between (Rothschild) and (Morgan Stanley) (the "Sale Agreement"), (Rothschild) assigned to the Assignee on 10th November 2004 all of the Assigned Rights (as that term is defined in the Sale Agreement, a copy of which is enclosed with this notice for your ease of reference).

[23] Based on the above facts and Singapore law, Mr Yeo concluded that the notice requirements for a statutory assignment were satisfied.

n) Dealing with the status of the petitioner before the service of the notice of Assignment of 7 April 2005 on the respondent, Mr Yeo opined that even if notice had not been given to Metroplex, the assignment of the rights by Rothschild to

Morgan Stanley remains effective as in equity the assignment of a debt is not a transaction between the creditor and the debtor. It is instead a transaction between the creditor and the assignee to which the consent of the debtor is not needed. To keep things in perspective, it should be borne in mind that notice is given to the debtor either to complete (or 'perfect') a statutory assignment or, in the case of an equitable assignment, to preserve priorities. In so far as Metroplex is concerned, there was an effective assignment in equity by 10 November 2004 pursuant to the S&P and this was perfected by a legal (or statutory) assignment when notice was given to Metroplex on 7 April 2005. Before then, Morgan Stanley could, on the authority of Parkway Hospitals Singapore Pte Ltd, sue Metroplex on the guarantee as an equitable assignee by joining Rothschild as a party to the proceedings (see para. 74 of Mr. Yeo's report). If, for some reason, the assignment by way of the S&P was ineffective, then the Further Assignment on 7 April 2005 (by way of the Deed of Assignment) operated to assign to Morgan Stanley "all of such right, title and interest of (Rothschild) in, to and under" any AR and 'Outstandings' which Rothschild retained as a result of the ineffective assignment under the S&P. Notice of this Further Assignment was also provided to both LIR and Metroplex on 7 April 2005 (hence the Further Assignment would have been a legal/ statutory assignment)

o) Following the recitation of the above facts and Singapore law, Mr Yeo concluded that the rights between Rothschild and each of LIR and Metroplex were effectively assigned to Morgan Stanley, at the latest by 7 April 2005.

Submission Of Counsel For The Respondent On The Third Issue

[24] Counsel for the respondent in his submission, relying on the opinion of QL refuted this conclusion of Mr Yeo with the following submission;

a) The assignment Letter dated 10 November 2004, was in fact meant to be a separate and independent assignment from the S&P and the Novation Notice and in law operated as a separate and independent assignment of all Rothschild's rights and title and interest in the loan under the Credit Agreement to the Petitioner.

b) The effect of Rothschild's assignment of its rights title and interest in the loan under the Credit Agreement to the petitioner on 10 November 2004 without assigning the benefits of the guarantee as well resulted in:

(i) The petitioner, as assignor, not having any right to enforce the guarantee nor any entitlement to commence an action against the respondent under the guarantee;

(ii) The respondent's obligations as guarantor under the Credit Agreement being discharged as against Rothschild; and

(iii) Rothschild not being entitled to maintain any action against the respondent under the guarantee after 10 November 2004.

c) Consequently, the subsequent assignment on 7 April 2005 of both the rights title and interest in the loan and the benefit of the guarantee under the Credit Agreement was of no effect because as of that date Rothschild had nothing left to assign and as of that date the respondent's obligations under the guarantee had already been discharged.

Decision Of Court On Third Issue

[25] I am unable to agree with the submission of counsel for the defendant. In my judgment, the definition of AR clearly included Rothschild's right to enforce the guarantee as security for payment of the sums owed by LIR. In my judgment, there was a valid and effective assignment of those rights to Morgan Stanley under the S&P. The S&P provided for Rothschild to, *inter alia*, assign the AR to Morgan Stanley. Notice of the assignment was given to LIR and Metroplex at the latest on or about 7 April 2005. I agree with Mr Yeo that these facts justify this court coming to the conclusion that, under Singapore law an effective legal or statutory assignment came into effect at the latest on 7 April 2005. The assignment was legal since it fulfilled all the pre requisites for a valid legal assignment. First, it is absolute since there were no condition attached and the assignor is seeking to pass his entire interest in the chose in action to the assignee. The operative clause ie cl. 2 of the S&P, expressly provided for the AR to be assigned to Morgan Stanley. The operative clause has to be read in the context of the definition of AR. In my opinion, read in this context, it is clear that this is an absolute assignment of Rothschild's Entire interest under the Credit Agreement.

[26] The second requirement that the assignment be in writing is obviously satisfied. The third requirement concerning notice has been complied by the notice to Metroplex. In my opinion, this notice clearly indicates to LIR of the assignment in favour of Morgan Stanley of the benefits previously held by Rothschild under the Credit Agreement (which includes the guarantee and indemnity). I agree with Mr Yeo that pending the notice given to Metroplex on 7 April 2005, the assignment of the rights by Rothschild to Morgan Stanley remains effective as in equity the assignment of a debt is not a transaction between the creditor and the debtor. It is instead a transaction between the creditor and the assignee to which the consent of the debtor is not needed. The notice is given to the debtor either to complete (or 'perfect') a statutory assignment or, in the case of an equitable assignment, to preserve priorities. In other words, in so far as Metroplex is concerned, there was an effective assignment in equity by 10 November 2004 pursuant to the S&P and this was perfected to a legal assignment when notice was given to Metroplex on 7 April 2005. I also concur with the view of Mr Yeo that even if I am wrong about the assignment having been effected by the S&P, then, the further assignment on 7 April 2005 (by way of a Deed of Assignment) operated to assign to Morgan Stanley "all of such rights, titles and interests of Rothschild in, to and under, and AR and outstandings" which Rothschild retained as a result of the ineffective novation under the S&P. Notice of this Further Assignment was also provided to both LIR and Metroplex on 7 April 2005 so as to render this further assignment to be a legal/statutory assignment.

Fourth Issue

Whether, Having Regard To The Construction Of Relevant Contemporaneous Documents Under Which The Assignment Of The Assigned Rights Was Effected, Rothschild Had Failed To Assign The Benefit Of The Guarantee At Or Around Or Shortly After 10th November 2004 And If Not, What Is The Effect Under Singapore Law?

[27] This issue arises in connection with the contention in the report of QL that under the letter dated 10 November 2004 from Rothschild to LIR, only the "loan" was assigned and not the benefit of the guarantee. To the extent that, in law, there cannot be a split in the identity of the creditor to whom obligations of borrower and guarantor, respectively, may be owed, the benefit of the guarantee was not assigned. For this proposition of law, QL relied on a paragraph in the book 'The Modern Contract of Guarantee' by

O' Donovan, that the assignee must show that the express assignment of the principal contract also impliedly carried with it the benefit of the guarantee. QL then referred to three points made by the learned author on this issue. The first is that where a creditor simply assigns the benefit of the principal contract and the words of the assignment are limited to that transaction, the benefit of the guarantee would not follow the assignment. The second point is that the court may draw the inference that the benefit of the contract of guarantee has been assigned where the words of the assignment although primarily intended to assign the principal transaction, are also wide enough to encompass an assignment of the benefit of the guarantee. The third point being that a guarantee, even if it is contained in a separate instrument, if drafted so as to refer to "successors, transferees, or assigns" of the original creditor, and there is simply an assignment of the principal transaction, not containing terms sufficient to assign the guarantee itself, it would still confer the benefit of the guarantee upon the assignee of the principal transaction. QL opined that, notwithstanding that on the facts of this case, the guarantee was contained within the Credit Agreement and the Notice of Assignment included reference to the Credit Agreement, these two facts in themselves were insufficient to overcome the absence of any reference to the guarantee. Hence, his conclusion that the guarantee was not assigned together with the Notice of Assignment of 10 November 2004. It must, of course, be borne in mind that QL's opinion to this effect is premised on the S&P not being the instrument of assignment and the instrument of assignment being the notice of assignment of 10 November 2004.

[28] Since I have already held the S&P, in particular cl. 2 of the S&P to be the instrument of assignment, I need not, strictly, deal with this issue. However, since submissions have been made on this issue and as there appears to be a conflict in the decisions originating from Australia on this issue, I propose to express my views on the same. In my opinion, following the decision of *Westpac Banking Corporation and Anor v. Market Services International Pty Ltd and Ors*; even if the guarantee was not assigned by the notice of assignment of 10 November 2004, the rights of the petitioner to enforce the guarantee was secured effective 7 April 2005 upon the execution of the further assignment and the service of the notice of Assignment on the respondent. The conclusion of QL that the right to enforce the guarantee was lost forever is contrary to the position under Australian law. I agree with the sentiments expressed by Justice Batt in the case of Westpac Banking that Justice Jacob JA

in his dissenting judgment in *International Leasing Corporation (Vic) Ltd v. Aiken* [1967] was referring to the rights of the original creditor and not the new creditor when His Lordship made mention of the cesser of the rights against the guarantor. Furthermore, Justice Jacob JA in the earlier case did not pronounce the rights of the original creditor against the guarantor as having been extinguished but only as deemed suspended while the debt remains assigned. In the face of this pronouncement, Justice Batt in Westpac Banking, in my view, correctly opined that re-assignment could have revived the rights of recovery on the part of the original creditor. However, more important is the observation of Justice Batt that there was nothing in the judgment of Justice Jacob JA which is inconsistent with the subsequent valid assignment of the guarantee to the assignee of the debt. Indeed, as observed by Justice Batt and, again, correctly, in my view, the language of suspension permits a subsequent assignment of the guarantee to the assignee of the debt which effectively would serve to restore the guarantor's rights of subrogation. With this pronouncement, Justice Batt dismissed the possibility of Jacob JA's pronouncement as amounting to causing a guarantee to cease and determine for good, in all cases, where it was not assigned simultaneously with the primary loan.

[29] It follows from the above, that under Singapore Law, the rights of the petitioner to enforce the guarantee was secured effective 7 April 2005 upon the execution of the further assignment and the service of the notice on the respondent. This assignment being valid, even if, Rothschild had failed to assign the benefit of the guarantee at or around or shortly after 10 November 2004.

[30] Based on my answers to the four issues framed by the parties, I dismiss encl. 12 with costs. I order the respondent to pay costs of RM40,000 in respect of encl. 12 to the petitioner. This amount, in my view, is reasonable having regard to the numerous affidavits and cross-examination of witnesses. I also order the respondent to bear the costs and expenses of the two Court appointed experts, Mr. Quentin Loh and Mr. Alvin Yeo to the extent not already borne by the respondent. I also order that the petitioner be granted dispensation from having to re-advertise the petition. Finally, I fix encl. 1 for hearing on 9 December 2010 at 2.30pm.